

# UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20<sup>th</sup> day of August, two thousand twelve.

Before: DENNIS JACOBS,  
*Chief Judge*,  
RICHARD C. WESLEY,  
*Circuit Judge*,  
RICHARD J. SULLIVAN,  
*District Judge.\**

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CHARLES BRYANT, individually and as next friend and guardian of D.B., AVA GEORGE, individually and as next friend and guardian of B.G., CHANIN HOUSTON-JOSEPHAT, individually and as next friend and guardian of A.J., LISA HUGHES, individually and as next friend and guardian of J.R., CARMEN PENA, individually and as next friend and guardian of G.T., VIVIAN PRESLEY, individually and as next friend and guardian of D.P., JAMIE TAM, individually and as next friend and guardian of S.T.,

JUDGMENT  
Docket No.: 10-4029

Plaintiffs-Appellants,

v.

NEW YORK STATE EDUCATION DEPARTMENT, DAVID M. STEINER, in his capacity as Commissioner of the New York State Education Department, THE NEW YORK STATE BOARD OF REGENTS,

Defendants-Appellees.

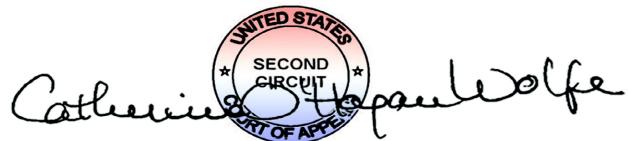
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The appeal in the above captioned case from a judgment of the United States District Court for the Northern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED in accordance with the opinion of this court.

For The Court:

Catherine O'Hagan Wolfe,  
Clerk of Court

 Catherine O'Hagan Wolfe



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- \* The Honorable Richard J. Sullivan, United States District Judge for the Southern District of New York, sitting by designation.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit



 Catherine O'Hagan Wolfe

10-4029-cv  
Bryant v. N.Y. State Educ. Dep't

**UNITED STATES COURT OF APPEALS**

**FOR THE SECOND CIRCUIT**

August Term, 2011

Decided: August 20, 2012)

Docket No. 10-4029-cv

CHARLES BRYANT, individually and as next friend and guardian of D.B., AVA GEORGE, individually and as next friend and guardian of B.G., CHANIN HOUSTON-JOSEPHAT, individually and as next friend and guardian of A.J., LISA HUGHES, individually and as next friend and guardian of J.R., CARMEN PENA, individually and as next friend and guardian of G.T., VIVIAN PRESLEY, individually and as next friend and guardian of D.P., JAMIE TAM, individually and as next friend and guardian of S.T..

**PLAINTIFFS-APPELLANTS**

- V. -

NEW YORK STATE EDUCATION DEPARTMENT, DAVID M.  
STEINER, in his capacity as Commissioner of the  
New York State Education Department, THE NEW  
YORK STATE BOARD OF REGENTS.

**DEFENDANTS-APPELLEES.**

Before: JACOBS, Chief Judge, WESLEY, Circuit  
Judge, and SULLIVAN, District Judge.<sup>1</sup>

<sup>1</sup> The Honorable Richard J. Sullivan, United States District Judge for the Southern District of New York, sitting by designation.

1       Plaintiffs--the parents and/or legal guardians of seven  
2 children with disabilities, who bring this suit on behalf of  
3 themselves and the children--appeal the judgment of the  
4 United States District Court for the Northern District of  
5 New York (Sharpe, J.), dismissing their suit for failure to  
6 state a claim upon which relief can be granted, and denying  
7 their motion for a preliminary injunction. Plaintiffs seek  
8 equitable relief preventing New York from enforcing a  
9 prohibition on the use of aversive interventions, which are  
10 negative consequences or stimuli administered if a child's  
11 disruptive behavior impedes the child's education.

12       We conclude that prohibiting one possible method of  
13 dealing with disorders in behavior, such as aversive  
14 intervention, does not undermine a child's right to an  
15 individualized, free and appropriate public education, and  
16 that New York's law represents the State's considered  
17 judgment regarding the education and safety of its children  
18 that is consistent with federal education policy and the  
19 United States Constitution.

20       The judgment of the district court is affirmed. Judge  
21 Sullivan has filed a separate opinion in which he concurs in  
22 part and in part dissents.

1 Michael P. Flammia, Eckert Seamans  
2 Cherin & Mellott, LLC, Boston, MA.  
3 (Jeffrey J. Sherrin, O'Connell and  
4 Aronowitz, P.C., Albany, NY, and  
5 Meredith H. Savitt, Law Office of  
6 Meredith Savitt, P.C., Delmar, NY, on  
7 the brief), for Plaintiffs-  
8 Appellants.  
9

10 Andrew B. Ayers, Assistant Solicitor  
11 General (Barbara D. Underwood,  
12 Solicitor General, Benjamin N.  
13 Gutman, Deputy Solicitor General, on  
14 the brief), for Eric T. Schneiderman,  
15 Attorney General of the State of New  
16 York, for Defendants-Appellees.  
17

18 DENNIS JACOBS, Chief Judge:

20 Plaintiffs--the parents and/or legal guardians of seven  
21 children with disabilities, who bring this suit on behalf of  
22 themselves and the children--appeal a judgment of the United  
23 States District Court for the Northern District of New York  
24 (Sharpe, J.), dismissing their suit for failure to state a  
25 claim upon which relief can be granted, and denying their  
26 motion for a preliminary injunction. Plaintiffs seek  
27 equitable relief preventing the New York Board of Regents  
28 ("Board of Regents"), the New York State Education  
29 Department ("Education Department"), and the Commissioner of  
30 the Education Department (David M. Steiner, in his official  
31 capacity) from enforcing a prohibition on the use of  
32 aversive interventions. Aversive interventions are negative  
33 consequences or stimuli administered to children who exhibit

1 problematic and disruptive behavior that impedes their  
2 education.

3 Plaintiffs contend that New York's prohibition of  
4 aversive interventions undermines their children's right to  
5 a free and appropriate public education ("FAPE"), which is  
6 guaranteed by federal law. We conclude that the State's  
7 prohibition of one possible method of reducing the  
8 consequences of a child's behavioral disability does not  
9 undermine the child's right to a FAPE or prevent  
10 administrators from enacting an individualized plan for the  
11 child's education.

12 Plaintiffs also contend that the State's prohibition  
13 violates the children's constitutional rights and the  
14 Rehabilitation Act of 1973 because the prohibition is  
15 arbitrary and oppressive, the product of gross misjudgment  
16 by State policymakers, and an infringement on the  
17 individualized assessment and treatment of students with  
18 disabilities. We conclude that New York's law represents a  
19 considered judgment by the State of New York regarding the  
20 education and safety of its children that is consistent with  
21 federal education policy and the United States Constitution.

22 Affirmed.

1

## BACKGROUND

2

## I

3       The Individuals with Disabilities Education Act ("the  
 4 IDEA") "is the most recent Congressional enactment in 'an  
 5 ambitious federal effort to promote the education of  
 6 handicapped children.'" Walczak v. Fla. Union Free Sch.  
 7 Dist., 142 F.3d 119, 122 (2d. Cir. 1998) (quoting Bd. of  
 8 Educ. v. Rowley, 458 U.S. 176, 179 (1982) (interpreting the  
 9 Education for All Handicapped Children Act, which was  
 10 subsequently amended and renamed the IDEA)). The IDEA  
 11 provides federal funds to states that "develop plans to  
 12 assure all children with disabilities the right to a free  
 13 appropriate public education." Id. (internal quotation  
 14 marks omitted). The IDEA requires that each child receive,  
 15 at least annually, an individualized education program  
 16 ("IEP")<sup>2</sup> detailing "special education and related services"  
 17 tailored for the particular needs of the child, 20 U.S.C.  
 18 § 1401(9), that are "reasonably calculated to enable the

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<sup>2</sup> The IEP is "a written statement that [inter alia]  
 'sets out the child's present educational performance,  
 establishes annual and short-term objectives for  
 improvements in that performance, and describes the  
 specially designed instruction and services that will enable  
 the child to meet those objectives.'" D.D. v. N.Y.C. Bd. of  
Educ., 465 F.3d 503, 507-08 (2d Cir. 2006) (quoting Honiq v.  
Doe, 484 U.S. 305, 311 (1988)); accord 20 U.S.C.  
 § 1414(d)(1)(A) (defining IEP).

1 child to receive educational benefits," Rowley, 458 U.S. at  
2 207.

3

4 **II**

5 The facts are taken from the well-pleaded factual  
6 allegations of the complaint, Bell Atl. Corp. v. Twombly,  
7 550 U.S. 544, 555, 570 (2007), and from information of which  
8 this Court can take judicial notice, see Taylor v. Vt. Dep't  
9 of Educ., 313 F.3d 768, 776 (2d Cir. 2002) (determining that  
10 a reviewing court can consider the complaint, documents  
11 attached to the complaint, documents incorporated by  
12 reference in the complaint, and public records when  
13 considering a motion to dismiss).

14 Plaintiffs are the parents or legal guardians of seven  
15 children, each of whom has a long history of severe behavior  
16 problems, including aggressive, self-injurious, destructive,  
17 and non-compliant behavior. These behavioral disabilities  
18 cause the children to engage in behaviors such as: yanking  
19 out their own teeth, attempting to stab themselves, tying  
20 ropes around their necks, scratching themselves, banging  
21 their heads on walls and other things, and assaulting  
22 teachers and staff members. These behaviors have impeded  
23 their education and development.

24 Plaintiffs have tried a number of measures to treat and  
25 educate these children, including: special education, day

1 and residential programs, psychiatric hospitalization,  
2 counseling, physical restraints, paraprofessional support,  
3 home instruction, sensory tents, positive-only programs of  
4 behavioral modification, and anti-psychotic and other  
5 psychotropic medications. None has been successful, and the  
6 children continue to pose physical risks to themselves and  
7 others. As a result, they have been foreclosed from public  
8 schools and private institutions or confined in psychiatric  
9 wards and detention centers. Each child's IEP now suggests  
10 they receive residential special-education services.

11 Accordingly, each child is enrolled at the Judge Rotenburg  
12 Educational Center, Inc. ("JRC") in Massachusetts.

13 JRC provides residential, educational, and behavioral  
14 services to individuals with severe behavioral disorders,  
15 and is often a placement of last resort for those who have  
16 proven resistant to other forms of psychological and  
17 psychiatric treatment. Although JRC is out of state, the  
18 children are permitted to attend under a New York law that  
19 allows New York students with disabilities who are unable to  
20 obtain an appropriate education in-state to attend an out-  
21 of-state facility that, in the judgment of the Education  
22 Department, can meet the needs of the child. N.Y. Educ. Law  
23 §§ 4407(1)(a), 4401(2)(f), (h).

24 At JRC, each student starts with a non-intrusive,  
25 positive-only, treatment program in which students receive

1 rewards (e.g., treats, video games, music, field trips) for  
2 maintaining positive behaviors, including learning. The  
3 complaint alleges that these positive-only measures are  
4 effective for most of JRC's school-age students. For other  
5 students, JRC may also employ negative-consequence  
6 interventions known as aversives or aversive interventions.

7 According to the complaint, aversive interventions have  
8 been used to deal with behaviors that pose significant  
9 dangers to the student or others, or significantly interfere  
10 with a student's education, development, or appropriate  
11 behavior. The techniques aim to stop the behavior and  
12 thereby enable the student to receive an appropriate  
13 education, to enjoy safety and well-being, and to develop  
14 basic skills for learning and daily living. The complaint  
15 alleges that aversive interventions have helped many JRC  
16 students to participate in activities with peers and helped  
17 some to attend college, join the armed forces, obtain  
18 employment, and go on extended family visits.

19 The types of aversive interventions used by JRC include  
20 helmets with safeguards that prevent removal, manual and  
21 mechanical restraints, and food-control programs. But,  
22 according to the complaint, JRC's "principal form" of  
23 aversive intervention is electric skin shock, in which a  
24 low-level electrical current is applied to a small area of  
25 the student's skin (usually an arm or a leg). The shock

1 lasts approximately two seconds, and is administered, on  
2 average, less than once a week. The complaint alleges that  
3 severe problematic behavior decreases with this regime, thus  
4 alleviating an impediment to academic progress. Possible  
5 side effects include temporary redness or marking, which  
6 clears up within a few minutes (or a few days at most), and  
7 a rare occurrence of blistering.

8       Clinicians have opined that it is necessary to  
9 supplement these children's ongoing educational and  
10 treatment programs with aversives. However, none of the  
11 children has yet received an IEP that authorizes such  
12 interventions.

13

14

### III

15       The Education Department, which is governed by the  
16 Board of Regents, regulates educational services and  
17 programs for New York residents. See N.Y. Educ. Law  
18 § 4403(3). It promulgates "regulations concerning standards  
19 for the protection of children in residential care from  
20 abuse and maltreatment," id. § 4403(11), and periodically  
21 inspects, reports on, and "make[s] recommendations  
22 concerning instructional programs or special services for  
23 all children with handicapping conditions who reside in or  
24 attend any . . . state financed . . . social service  
25 facilities, youth facilities, health facilities, [or] mental

1 health, mental retardation and developmental disabilities  
 2 facilities," id. § 4403(4).

3 In 2006, the Board of Regents promulgated a regulation  
 4 prohibiting schools, including "approved out-of-state day or  
 5 residential schools" (such as JRC), from using aversive  
 6 interventions. N.Y. Comp. Codes R. & Regs. tit. 8,  
 7 § 19.5(b)(1) (2012). The regulation defines an "aversive  
 8 intervention" as an intervention "intended to induce pain or  
 9 discomfort to a student for the purpose of eliminating or  
 10 reducing maladaptive behaviors," such as the contingent  
 11 application of painful, intrusive, or similar stimuli or  
 12 activity. Id. § 19.5(b)(2).<sup>3</sup>

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<sup>3</sup> In full, the regulation defines "aversive intervention" as

an intervention that is intended to induce pain or discomfort to a student for the purpose of eliminating or reducing maladaptive behaviors, including such interventions as:

- (i) contingent application of noxious, painful, intrusive stimuli or activities; strangling, shoving, deep muscle squeezes or other similar stimuli;
- (ii) any form of noxious, painful or intrusive spray, inhalant or tastes;
- (iii) contingent food programs that include the denial or delay of the provision of meals or intentionally altering staple food or drink in order to make it distasteful;
- (iv) movement limitation used as a punishment, including but not limited to helmets and mechanical restraint devices; or
- (v) other stimuli or actions similar to the interventions described in subparagraphs (i) through (iv) of this paragraph.

N.Y. Comp. Codes R. & Regs. tit. 8, § 19.5(b)(2) (2012).

1 A child-specific exemption allows pre-approved  
2 aversives to be administered in exceptional cases in the  
3 three school years following the enactment of the  
4 prohibition (2006-2007, 2007-2008, 2008-2009), and a  
5 grandfather clause provides "that a student whose IEP  
6 includes the use of aversive interventions as of June 30,  
7 2009"--three years after the enactment of the prohibition--  
8 "may be granted a child-specific exception in each  
9 subsequent school year . . . ." N.Y. Comp. Codes R. & Regs.  
10 tit. 8, § 200.22(e).

11 Neither exception applies to the children in the  
12 instant case because the initial three years of limited  
13 aversive interventions has now ended, and none of these  
14 children had an IEP that authorized aversives prior to June  
15 30, 2009.

## DISCUSSION

18 Plaintiffs raised below and press on appeal numerous  
19 challenges to New York's prohibition of aversive  
20 interventions and seek declaratory and injunctive relief  
21 preventing its enforcement. Specifically, Plaintiffs  
22 contend that New York's regulation violates: [1] the IDEA;  
23 [2] the Rehabilitation Act of 1973; and [3] the Due Process  
24 and Equal Protection clauses of the United States  
25 Constitution.

1       The district court granted Defendants' motion to  
 2 dismiss all those claims for relief. We review that  
 3 decision de novo, "construing the complaint liberally,  
 4 accepting all factual allegations in the complaint as true,  
 5 and drawing all reasonable inferences in the plaintiff[s']  
 6 favor." Chambers v. Time Warner, Inc., 282 F.3d 147, 152  
 7 (2d Cir. 2002). Although all factual allegations in the  
 8 complaint must be assumed true for the purposes of a motion  
 9 to dismiss, this principle is "inapplicable to legal  
 10 conclusions" and "'formulaic recitation[s] of the elements  
 11 of a cause of action.'" Ashcroft v. Iqbal, 556 U.S. 662,  
 12 678 (2d Cir. 2009) (quoting Twombly, 550 U.S. at 555). To  
 13 survive a motion to dismiss, a complaint must allege "enough  
 14 facts" to "raise a right to relief above the speculative  
 15 level" and "state a claim to relief that is plausible."  
 16 Twombly, 550 U.S. at 555, 570; accord id. at 555 n.3.

17       In addition to dismissing Plaintiffs' complaint under  
 18 Rule 12(b)(6), the district court also denied Plaintiffs'  
 19 motion for a preliminary injunction. We review that ruling  
 20 for abuse of discretion. Ashcroft v. Am. Civil Liberties  
 21 Union, 542 U.S. 656, 664 (2004); Malletier v. Burlington  
 22 Coat Factory Warehouse Corp., 426 F.3d 532, 537 (2d Cir.  
 23 2005). "A district court abuses its discretion when (1) its  
 24 decision rests on an error of law . . . or a clearly  
 25 erroneous factual finding, or (2) its decision--though not

1 necessarily the product of a legal error or a clearly  
2 erroneous factual finding--cannot be located within the  
3 range of permissible decisions." Mullins v. City of New  
4 York, 626 F.3d 47, 51 (2d Cir. 2010) (internal quotation  
5 marks omitted; ellipsis in original).

6

7 **I**

8 A standing question has arisen. While this appeal was  
9 pending, the Massachusetts Department of Developmental  
10 Services promulgated a regulation that governs JRC (as a  
11 school in the Commonwealth), and bars it from using some  
12 aversives on these children and others.

13 The Massachusetts regulation, 115 Mass. Code Regs.  
14 5.14 (2012), prohibits the use of certain aversive  
15 interventions--including "contingent application of physical  
16 contact aversive stimuli such as spanking, slapping, hitting  
17 or contingent skin shock," id. 5.14(3)(d)1.; see also id.  
18 5.14(3)(d)--unless the child had a court-approved treatment  
19 permitting the use of aversives before September 1, 2011  
20 (which none of the children at issue in this case had). The  
21 Massachusetts regulation permits other aversive  
22 interventions--including "[c]ontingent application of  
23 unpleasant sensory stimuli such as loud noises, bad tastes,  
24 bad odors, or other stimuli which elicit a startle  
25 response," and "delay of [a] meal for a period not exceeding

1 30 minutes," id. 5.14(3)(c)1.c.-d.--if they are contained in  
 2 the student's written behavior modification plan and if that  
 3 behavior modification plan meets certain special  
 4 requirements. See id. 5.14(4)(c).

5 Because certain aversive interventions, such as the  
 6 electric skin shock--the "principal form" of aversive  
 7 intervention used by JRC--are no longer permitted in  
 8 Massachusetts, Defendants contend that Plaintiffs' claims  
 9 are moot. We disagree.

10 First, the question is not one of mootness. New York's  
 11 prohibition on aversive interventions remains in effect and  
 12 applicable to these children. Accordingly, the case and  
 13 controversy is not moot. Cf. Lamar Advertising of Penn, LLC  
 14 v. Town of Orchard Park, 356 F.3d 365, 375-76 (2d Cir. 2004)  
 15 (explaining that, in the case of a statute or regulation, a  
 16 claim usually becomes moot when a statute or regulation is  
 17 amended).

18 The question is whether Plaintiffs retain standing, for  
 19 which: [1] "the plaintiff must have suffered an injury in  
 20 fact" that is both "concrete and particularized" and "actual  
 21 or imminent, not conjectural or hypothetical"; [2] "there  
 22 must be a causal connection between the injury and the  
 23 conduct complained of" such that the injury is "fairly  
 24 traceable to the challenged action of the defendant"; and  
 25 [3] "it must be likely, as opposed to merely speculative,

1 that the injury will be redressed by a favorable decision."  
 2 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)  
 3 (internal quotation marks, citations, brackets, and ellipsis  
 4 omitted). Defendants contend that redressability has been  
 5 foreclosed by Massachusetts' new regulation.

6 We conclude that a decision favorable to Plaintiffs  
 7 would likely redress their injury for several reasons.  
 8 First, if Plaintiffs prevailed, the children could receive  
 9 the aversives that the new Massachusetts regulation  
 10 continues to permit; whereas the New York regulation  
 11 prohibits *all* aversives for these children, the  
 12 Massachusetts regulation does not. Compare N.Y. Comp. Codes  
 13 R. & Regs. tit. 8, § 19.5(b), with 115 Mass. Code Regs.  
 14 5.14(3)(c), (3)(d). True, electric skin shocks are the  
 15 "principal form" of aversive interventions used by JRC; but  
 16 if Plaintiffs prevail, the children may be able to receive  
 17 other aversives at JRC.

18 Second, Defendants erroneously assume that if these  
 19 children are unable to receive aversive interventions at  
 20 JRC, they will be unable to obtain aversives anywhere. The  
 21 complaint seeks an injunction preventing Defendants' from  
 22 enforcing New York's prohibition on aversives and a  
 23 declaration that the prohibition violates the U.S.  
 24 Constitution and federal law. The prayer for relief is not  
 25

1 limited to treatment at JRC or in Massachusetts; JRC is not  
 2 mentioned in the prayer for relief.

3 As all the parties concede, no facility other than JRC  
 4 is currently treating New York children with aversive  
 5 interventions. But this is hardly surprising since New York  
 6 largely bans the use of aversive interventions. If New  
 7 York's prohibition was declared invalid, it is "likely" that  
 8 other facilities in New York would provide aversives. See  
 9 Lujan, 504 U.S. at 561 (internal quotation marks omitted).  
 10 It is also likely that these children could go to a facility  
 11 in another state. See N.Y. Educ. Law §§ 4407(1)(a),  
 12 4401(2)(f), (h) (providing that New York students with  
 13 disabilities who cannot obtain an appropriate education in  
 14 New York may attend an out-of-state facility that the  
 15 Education Department determines can meet the child's  
 16 needs).<sup>4</sup>

17 Finally, Plaintiffs would have standing to challenge  
 18 the New York prohibition even if, as Defendants argue, the

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<sup>4</sup> A number of other states have substantially limited or outright prohibited the use of aversive interventions in schools and with students. See Cal. Educ. Code § 56520(a)(3); 22 Pa. Code § 14.133(e); Mont. Admin. R. 10.16.3346(4); N.C. Gen. Stat. § 155C-391.1(b)(2), (h); Nev. Rev. Stat. § 388.5265; Wash. Admin. Code § 392-172A-03125; 22 Va. Admin. Code. § 40-151-820; N.H. Code Admin. R. Ed. §§ 1113.04, 1113.06; D.C. Code §§ 38-2561.03(b)(1), 38-2561.01. However, there is no indication that these children would not be able to attend a school in some other state that could provide them aversive interventions, if necessary.

1 Massachusetts law would be an additional impediment to  
2 aversive interventions for these children. First,  
3 Plaintiffs are prevented by issues of personal jurisdiction,  
4 service, and venue from challenging the Massachusetts and  
5 New York prohibitions in a single lawsuit; but their need to  
6 invalidate the Massachusetts regulation would not deprive  
7 them of standing to challenge the regulation in New York.

8 See Khodara Envt'l, Inc. v. Blakey, 376 F.3d 187, 194-96 (3d  
9 Cir. 2004) (as amended) (Alito, J.); accord Lamar Adver. of  
10 Penn, 356 F.3d at 374 (holding that the plaintiff had  
11 standing to challenge a law blocking its posting of certain  
12 advertising even though the plaintiff had not sought a  
13 permit, which was an additional impediment to the  
14 advertising). Second, Plaintiffs' claimed injury is not (as  
15 Defendants contend) that these children are unable to obtain  
16 aversives generally, but rather that the New York  
17 prohibition prevents them from receiving aversives. Viewed  
18 properly, Plaintiffs can obtain redress in this litigation:  
19 authority to obtain aversive interventions under New York  
20 law. Accordingly, Plaintiffs continue to enjoy standing  
21 because a favorable judgment would make it "likely" that  
22 they could ultimately obtain the treatment they seek. See  
23 Lujan, 504 U.S. at 561 (internal quotation marks omitted).

1 **II**

2       Two types of claims lie under the IDEA: [1] a  
 3       procedural claim challenging the State's compliance with the  
 4       procedures set forth in the IDEA, and [2] a substantive  
 5       claim challenging whether the IEP is reasonably calculated  
 6       to enable the student to receive educational benefits. See  
 7       Walczak, 142 F.3d at 129.<sup>5</sup> Plaintiffs assert both kinds of  
 8       claim.

9  
10 **A**

11       Plaintiffs' procedural claim is that prohibiting  
 12       aversive interventions prevents these children from  
 13       obtaining a truly *individualized* education program because  
 14       they are categorically barred from getting an IEP that

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<sup>5</sup> An IEP sets out in writing, inter alia, (1) the child's present levels of academic achievement and functional performance; (2) the short-term academic and functional objectives; (3) the measurable annual goals for the child, including academic and functional goals; (4) the specific educational and related services to be provided to the child and the extent to which the child will be able to participate in general educational programs and curriculum; (5) the transition services needed for the child to leave the school setting; (6) the projected commencement for and duration of proposed services; and (7) objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether academic and functional objectives are being achieved. 20 U.S.C. § 1414(d)(1)(A). The IEP is developed by a school official qualified in special education, at least one special education teacher, at least one general education teacher, other qualified individuals, the child's parents, and (where appropriate) the child. Id. § 1414(d)(1)(B).

1 includes aversive interventions without regard to their  
 2 individual needs. See D.D. v. N.Y.C. Bd. of Educ., 465 F.3d  
 3 503, 511 (2d Cir. 2006) (explaining "that the right to a  
 4 free appropriate public education [FAPE] is afforded to each  
 5 disabled child as an individual").

6 Nothing in New York's regulation prevents  
 7 individualized assessment or precludes educators from  
 8 considering a wide range of possible treatments. The  
 9 regulation prohibits consideration of a single method of  
 10 treatment without foreclosing other options. In so doing,  
 11 the regulation follows the goals and emphasis of the IDEA.  
 12 See 20 U.S.C. § 1400(c)(5)(F) ("Almost 30 years of research  
 13 and experience has demonstrated that the education of  
 14 children with disabilities can be made more effective by  
 15 . . . positive behavioral interventions and supports"); 64  
 16 Fed. Reg. 12406, 12589 (Mar. 12, 1999) ("[T]he primary focus  
 17 must be on ensuring that the behavioral management  
 18 strategies in the child's IEP reflect the [IDEA's]  
 19 requirement for the use of positive behavioral interventions  
 20 and strategies to address the behavior that impedes the  
 21 learning of the child or that of other children.").<sup>6</sup>

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<sup>6</sup> See also 20 U.S.C. § 1411(e)(2)(C)(iii) (allowing states to reserve federal funding "[t]o assist local education agencies in providing positive behavior interventions and supports"); id. § 1414(d)(3)(B)(i) (providing that the IEP team should "consider the use of positive behavioral interventions and supports, and other

1    Although the IDEA does not prohibit alternatives such as  
 2   aversives, see 20 U.S.C. § 1414(d)(3)(B)(i), it cannot be  
 3   said that a policy that relies on positive behavioral  
 4   interventions only is incompatible with the IDEA.

5       Plaintiffs argue that, because the regulation  
 6    eliminates one possible method from the students' IEP, it  
 7    amounts to a predetermination that violates the procedural  
 8    guarantees of the IDEA, as explained in Deal v. Hamilton  
 9    Cnty. Bd. of Educ., 392 F.3d 840 (6th Cir. 2004). However,  
 10    there is a distinction between a policy that affects  
 11    individual cases on a categorical basis (such as the policy  
 12    at issue here) and a local predetermination that rejects  
 13    preemptively a measure that is permitted as a matter of  
 14    state law.

15       In Deal, a school district refused to consider a  
 16    particular teaching approach. Id. at 845-46. The Sixth  
 17    Circuit concluded that foreclosure of a program without

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strategies, to address" "behavior [that] impedes the child's learning or that of others"); id. § 1454(a)(3)(B)(iii)(I) (allowing states to use federal grants to train educators in methods of "positive behavioral interventions and supports to improve student behavior in the classroom"); id. § 1462(a)(6)(D) (authorizing the Secretary of Education to enter into contracts with entities to ensure training in "positive behavioral supports."); id. § 1465(b)(1)(B)-(C) (permitting the Secretary of Education to support effective, research-based practices through training educators in "positive behavioral interventions and supports" and "effective strategies for positive behavioral interventions").

1 regard for its effectiveness was a procedural violation of  
 2 the IDEA because it deprived the parents of meaningful  
 3 participation in the IEP process. Id. at 857. We need not  
 4 pass on the reasoning of Deal because unlike the instant  
 5 challenge to a statewide prohibition enacted by a state  
 6 government, Deal involved a challenge to an unofficial  
 7 district policy involving a particular child's specific IEP  
 8 as to which the parents had a statutory right of input, 20  
 9 U.S.C. § 1414(d)(1)(B).

10 The distinction is significant. See Alleyne v. N.Y.  
 11 State Educ. Dep't, 691 F. Supp. 2d 322, 333 n.9 (N.D.N.Y.  
 12 2010) (distinguishing between authorities considering  
 13 predetermination in IEPs and the promulgation of statewide  
 14 regulations). "The IDEA was enacted to assist states in  
 15 providing special education and related services to children  
 16 with disabilities . . . not [to] usurp the state's  
 17 traditional role in setting educational policy." Taylor,  
 18 313 F.3d at 776-77. "Congress did not prescribe any  
 19 substantive standard of education" in the IDEA. J.D. v.  
 20 Pawlet Sch. Dist., 224 F.3d 60, 65 (2d Cir. 2000). Instead,  
 21 the IDEA "'incorporates state substantive standards as the  
 22 governing federal rule' if they are consistent with the  
 23 federal scheme and meet the minimum requirements set forth  
 24 by the IDEA." Taylor, 313 F.3d at 777 (quoting Mrs. C. v.  
 25 Wheaton, 916 F.2d 69, 73 (2d Cir. 1990)).

1       Moreover, Plaintiffs' interpretation of the IDEA would  
2 effectively strip state governments of the ability to adopt  
3 statewide policy because it is impossible to consider each  
4 student's circumstances before adopting statewide policy.  
5       For this reason, New York collects input--by parents,  
6 professionals, and the public--when the Education Department  
7 publishes a proposed regulation and an opportunity is  
8 afforded for notice and comment. See N.Y. State Register,  
9 Rule Making Activities, Nov. 15, 2006.

10       In this case, New York adopted the ban of aversives  
11 only after the Education Department made site visits,  
12 reviewed reports, and considered complaints from parents as  
13 well as school districts and others raising concerns about  
14 aversive techniques. Notice of Emergency Adoption &  
15 Proposed Rulemaking, N.Y. State Educ. Dep't, June 20, 2006.  
16 It concluded that aversive interventions are dangerous and  
17 may backfire and that positive behavioral interventions are  
18 sufficiently effective to provide a FAPE. Id.

19       The prohibition therefore represents a considered  
20 judgment; one that conforms to the IDEA's preference for  
21 positive behavioral intervention. See, e.g., 20 U.S.C.  
22 § 1400(c)(5)(F). (Another such New York policy is the long-  
23 standing bar on corporal punishment. See N.Y. Comp. Codes  
24 R. & Regs. tit. 8, § 19.5(a).) The IDEA does not  
25 categorically bar such statewide regulations that resolve

1 problems in special education; otherwise, the IDEA would be  
2 transformed from a legislative scheme that preserves the  
3 states' fundamental role in education to one that usurps the  
4 role of the states. Cf. Rowley, 458 U.S. at 208 (explaining  
5 that "Congress' intention was not that the [IDEA] displace  
6 the primacy of States in the field of education, but that  
7 States receive funds to assist them in extending their  
8 educational systems to the handicapped").<sup>7</sup>

9 In sum, New York's regulation prohibits only  
10 consideration of a single method of treatment without  
11 foreclosing other options. Nothing in the regulation  
12 prevents individualized assessment, predetermines the  
13 children's course of education, or precludes educators from  
14 considering a wide range of possible treatments. Therefore,  
15 the district court correctly dismissed the procedural IDEA  
16 claim.

17

18 **B**

19 Plaintiffs contend that the prohibition on aversive  
20 interventions is a substantive violation of the IDEA because  
21 aversives are necessary to control the severe behavioral

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<sup>7</sup> Plaintiffs direct our attention to Kalliope R. v. N.Y. State Dep't of Educ., 827 F. Supp. 2d 130 (E.D.N.Y. 2010), which concerned the State's foreclosure of a particular intensive teaching technique. Kalliope, however, is an interlocutory opinion, never appealed, that relied on Deal.

1 disorders that undermine the children's education.  
 2 Plaintiffs allege that a positive-only program is effective  
 3 with 70% of students but that each of these children fall  
 4 within the 30% who are not sufficiently treated with  
 5 positive-only interventions.

6 For many of the reasons discussed above, Plaintiffs  
 7 cannot state a substantive IDEA claim. The prohibition on  
 8 aversive interventions does not prevent these students from  
 9 obtaining an IEP specifically aimed at providing them an  
 10 appropriate education. Moreover, the Education Department  
 11 has decided to focus its special-education programs on  
 12 positive-only behavioral interventions, which is the clear  
 13 (although not exclusive) methodology favored by the IDEA.

14 Even if we assumed that permitting these children to  
 15 receive aversive interventions would help them fulfill their  
 16 potential, Plaintiffs' substantive claim would still fail.  
 17 The "IDEA does not require states to develop IEPs that  
 18 'maximize the potential of handicapped children.'" Walczak,  
 19 142 F.3d at 132 (quoting Rowley, 458 U.S. at 189); accord  
 20 Rowley, 458 U.S. at 197-98 & n.21. The IDEA "guarantees"  
 21 only that students with disabilities are provided an  
 22 "'appropriate' education, not one that provides everything  
 23 that might be thought desirable by loving parents."  
 24 Walczak, 142 F.3d at 132 (internal quotation marks omitted).  
 25 A state satisfies its obligation to provide a free

1 appropriate public education if it "provide[s] a disabled  
 2 child with meaningful access to an education" even if the  
 3 state "cannot guarantee totally successful results." Id. at  
 4 133 (citing Rowley, 458 U.S. at 192); accord Rowley, 458  
 5 U.S. at 195 (explaining that the IDEA "imposes no clear  
 6 obligation upon recipient States beyond the requirement that  
 7 handicapped children receive some form of specialized  
 8 education").

9 Defendants provide these students with meaningful  
 10 access to education opportunities by authorizing and funding  
 11 their specialized education and behavioral modification  
 12 treatment at an out-of-state residential facility that has  
 13 expertise in treating children with severe behavioral  
 14 disorders. Aversive interventions may help maximize the  
 15 children's potential, but the IDEA does not require such  
 16 measures.<sup>8</sup>

17 Moreover, we decline Plaintiffs' invitation to review  
 18 and second guess New York's education policy. Although the  
 19 IDEA provides for some judicial review, "the Supreme Court  
 20 has cautioned[] . . . that this 'independent' review 'is by  
 21 no means an invitation to the courts to substitute their own

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<sup>8</sup> Significantly, none of these students received an IEP that authorized use of aversive interventions before the enactment of the regulation in 2006 or during the grandfathering period when a child-specific exception was available.

1       notions of sound educational policy for those of the school  
 2       authorities they review.' " See Walczak, 142 F.3d at 129  
 3       (quoting Rowley, 458 U.S. at 206). We will not "simply  
 4       rubber stamp" the decisions of the states and locals, but we  
 5       must be "mindful that the judiciary generally lacks the  
 6       specialized knowledge and experience necessary to resolve  
 7       persistent and difficult questions of educational policy."  
 8       Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d  
 9       Cir. 2005) (internal quotation marks omitted); accord  
 10      Rowley, 458 U.S. at 207 ("[C]ourts must be careful to avoid  
 11       imposing their view of preferable educational methods upon  
 12       the States." ).

13           There is an ongoing debate among the experts regarding  
 14       the advantages and disadvantages of aversive interventions  
 15       and positive-only methods of behavioral modification. The  
 16       judiciary is ill-suited to decide the winner of that debate.  
 17       See Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 383  
 18       (2d Cir. 2003) (as amended) (reversing a district court  
 19       decision finding IEPs inadequate because the district court  
 20       "impermissibly chose between the views of conflicting  
 21       experts on a controversial issue of educational policy").

22           Our deference to the Education Department's decision is  
 23       further justified in this instance because New York adopted  
 24       the regulation after the Education Department obtained  
 25       information raising concerns regarding the potential health

1 and safety implications of aversives. See Notice of  
 2 Emergency Adoption & Proposed Rulemaking, N.Y. State Educ.  
 3 Dep't, June 20, 2006. The Education Department was  
 4 concerned that aversive interventions can result in  
 5 "aggressive and/or escape behaviors" and can foster the  
 6 development of "negative attitudes toward [one's] self and  
 7 school programs," id.--concerns raised by reports and  
 8 complaints by parents, school districts, and others. One  
 9 such source of concern was a lawsuit alleging abuse at JRC,  
 10 see Nicholson v. New York, 872 N.Y.S. 2d 846 (Ct. Cl. 2008),  
 11 which prompted a site visit on which the Education  
 12 Department "identified significant concerns for the  
 13 potential impact on the health and safety of New York  
 14 students," see Notice of Emergency Adoption & Proposed  
 15 Rulemaking, N.Y. State Educ. Dep't, June 20, 2006. This  
 16 Court is not institutionally suited to now second guess the  
 17 policy decision made by experts charged with formulating  
 18 education policy in New York. See Cerra, 427 F.3d at 192.

19 Because Plaintiffs have not and cannot allege that  
 20 these children have been deprived of a FAPE, they cannot  
 21 prevail on their substantive IDEA claim.<sup>9</sup>

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<sup>9</sup> The dissent concludes that a reasonable justification for preventing use of aversive therapies cannot be located in the record. We respectfully disagree. But even if there were no express justification, some justifications are implicit in the policy.

III

2 In addition to their procedural and substantive IDEA  
3 claims, Plaintiffs also assert a claim under the  
4 Rehabilitation Act. Section 504 of the Rehabilitation Act  
5 provides: "No otherwise qualified individual with a  
6 disability . . . shall, solely by reason of her or his  
7 disability, be excluded from the participation in, be denied  
8 the benefits of, or be subjected to discrimination under any  
9 program or activity receiving Federal financial assistance  
10 . . . ." 29 U.S.C. § 794(a).

11 To establish a *prima facie* case under the  
12 Rehabilitation Act, a plaintiff must allege: [1] that he or  
13 she is a person with disabilities under the Rehabilitation  
14 Act, [2] who has been denied benefits of or excluded from  
15 participating in a federally funded program or special  
16 service, [3] solely because of his or her disability. See  
17 Mrs. C., 916 F.2d at 74. Plaintiffs, however, do not argue  
18 that the regulation banning aversive interventions denies  
19 them benefits on the basis of disability: The regulation  
20 applies to all students, regardless of disability.<sup>10</sup>

<sup>10</sup> Plaintiffs also cannot state a Rehabilitation Act claim for discrimination against people with disabilities who are students. See J.D., 224 F.3d at 70. Under the Rehabilitation Act, states receiving federal funds must "provide a free appropriate public education to each qualified handicapped person." Id. (quoting 34 C.F.R. § 104.33(a)). This obligation can be satisfied by, inter alia, providing the student an IEP. 34 C.F.R.

1        Plaintiffs contend, however, that they state a claim  
 2 under Rehabilitation Act because New York's ban on aversives  
 3 was promulgated in bad faith or is the result of gross  
 4 mismanagement. See Wegner v. Canastota Cent. Sch. Dist.,  
 5 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (relying on Brantley  
 6 v. Indep. Sch. Dist. No. 625, 936 F. Supp. 649, 657 (D.  
 7 Minn. 1996) (citing Monahan v. Nebraska, 687 F.2d 1164,  
 8 1170-71 (8th Cir. 1982))). We have never held that such a  
 9 claim exists under the Rehabilitation Act, but even assuming  
 10 that it does, Plaintiffs' complaint fails to state such a  
 11 claim.

12        Plaintiffs' allegations of bad faith and gross  
 13 mismanagement are refuted by the facts (of which we have  
 14 taken judicial notice) that the Education Department [1]  
 15 investigated the matter before offering the regulation for  
 16 public comment and [2] received the public's comments before  
 17 promulgating the regulation. See Notice of Emergency  
 18 Adoption & Proposed Rulemaking, N.Y. State Educ. Dep't, June  
 19 20, 2006; N.Y. State Register of Rule Making Activities,  
 20 Nov. 15, 2006.

21        Plaintiffs' response that bad faith or gross  
 22 mismanagement is manifest because there is no scholarly

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§ 104.33(b)(1). As explained previously, the prohibition on aversives does not prevent educators from implementing IEPs for these children nor does it preclude their receipt of a FAPE.

1 support for banning aversives is similarly refuted by the  
2 Education Department's citation to scholarly literature  
3 discussing the dangers of aversives and the benefits of  
4 positive-only treatment. See Notice of Emergency Adoption &  
5 Proposed Rulemaking, N.Y. State Educ. Dep't, June 20, 2006.  
6 In any event, such a dispute (regarding which education  
7 policy is the most scientifically sound and effective  
8 approach that is least likely to present health, safety, and  
9 moral and ethical concerns) is best left for resolution by  
10 the policymakers and education administrators, not the  
11 judiciary. See Cerra, 427 F.3d at 192; see also Rowley, 458  
12 U.S. at 206-07; Walczak, 142 F.3d at 129.

13

14

#### IV

15 In addition to their statutory claims, Plaintiffs also  
16 contend that New York's prohibition of aversives deprives  
17 them of their constitutional rights to substantive and  
18 procedural due process and equal protection. Each claim is  
19 addressed in turn.

20

21

#### A

22 Plaintiffs contend that the ban on aversive  
23 interventions deprives these children of substantive due  
24 process. Plaintiffs cannot prevail on such a claim because

1 there is no substantive due process right to public  
 2 education.

3 "[T]he Due Process Clause of the Fourteenth Amendment  
 4 embodies a substantive component that protects against  
 5 'certain government actions regardless of the fairness of  
 6 the procedures used to implement them.'" Immediato v. Rye  
 7 Neck Sch. Dist., 73 F.3d 454, 460 (2d Cir. 1996) (quoting  
 8 Daniels v. Williams, 474 U.S. 327, 331 (1986)). In  
 9 examining whether a government rule or regulation infringes  
 10 a substantive due process right, "the first step is to  
 11 determine whether the asserted right is 'fundamental,'"--  
 12 i.e., "implicit in the concept of ordered liberty, or deeply  
 13 rooted in this Nation's history and tradition," Leebaert v.  
 14 Harrington, 332 F.3d 134, 140 (2d Cir. 2003) (internal  
 15 quotation marks omitted). Where the right infringed is  
 16 fundamental, the regulation must be narrowly tailored to  
 17 serve a compelling government interest. Immediato, 73 F.3d  
 18 at 460. Where the right infringed is not fundamental, "the  
 19 governmental regulation need only be reasonably related to a  
 20 legitimate state objective." Id. at 461.

21 The right to public education is not fundamental.  
 22 Handberry v. Thompson, 446 F.3d 335, 352 (2d Cir. 2006)  
 23 (citing Plyler v. Doe, 457 U.S. 202, 221 (1982); San Antonio  
 24 Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973)).  
 25 Thus, even if Plaintiffs alleged that these children were

1 unable to receive a public education at all because they can  
2 no longer receive aversives, the bar on aversive  
3 interventions would still comport with due process if it was  
4 reasonably related to a legitimate government objective.

5 The regulation rises to that low threshold because it serves  
6 a legitimate government objective: preventing students from  
7 being abused or injured by aversive interventions.

8 Realizing that there is no fundamental right to public  
9 education, Plaintiffs contend they have been deprived of the  
10 substantive due process because the ban on aversives is  
11 arbitrary and capricious (because, as Plaintiffs argue,  
12 aversives are effective and there is no scientific support  
13 for banning them). This argument is addressed above.

14 Moreover, we decline Plaintiffs' invitation to engage in  
15 policymaking decisions that are best left to the political  
16 branches. See Cerra, 427 F.3d at 192. In any event, safety  
17 and ethical concerns as well as the potential for abuse  
18 suffice to establish that New York's prohibition is not  
19 arbitrary and capricious--even if, as Plaintiffs contend,  
20 aversives are the best and, perhaps, only way to effectively  
21 treat these children's severe behavior disorders.

22

23

24

25

1

**B**

2        Plaintiffs' procedural due process claim largely  
3    duplicates the procedural IDEA claim and fails for the same  
4    reasons.

5        A procedural due process claim is composed of two  
6    elements: (1) the existence of a property or liberty  
7    interest that was deprived and (2) deprivation of that  
8    interest without due process. See Narumanchi v. Bd. of  
9    Trustees, 850 F.2d 70, 72 (2d Cir. 1988). As a general  
10   matter, Plaintiffs may have a property interest in public  
11   education. See Handberry, 446 F.3d at 353 (discussing New  
12   York law). The prohibition on aversives, however, does not  
13   prevent these children from obtaining a public education,  
14   even if, as Plaintiffs allege, these children would receive  
15   a better education if aversive interventions were permitted.

16       Instead, Plaintiffs contend that they have an interest  
17   in individualized assessments under the IDEA and that this  
18   interest is undermined by the prohibition on aversive  
19   interventions. This claim mirrors the procedural IDEA claim  
20   and fails for the same reason: Plaintiffs have not alleged  
21   that the prohibition on aversive interventions prevents an  
22   individualized assessment, education, or treatment of these  
23   children. The prohibition merely removes one possible form  
24   of treatment from the range of possible options. Each child  
25   is still able to receive an education plan that is tailored

1 to his or her specific needs in all other respects.

2 In addition, this claim fails because Plaintiffs do not  
3 possess a property interest in any particular type of  
4 education program or treatment. See Handberry, 446 F.3d at  
5 352. Plaintiffs contend that their property right  
6 originates in the IDEA but, given the IDEA's strong  
7 preference for positive behavioral intervention, see, e.g.,  
8 20 U.S.C. § 1400(c)(5)(F), the IDEA does not create a  
9 property interest in the possible receipt of aversive  
10 interventions as part of an IEP.

11

12 **C**

13 Plaintiffs contend that the prohibition on aversive  
14 interventions violates equal protection by treating them  
15 differently than other students who had IEPs permitting them  
16 to receive aversives before June 30, 2009--the cut-off date  
17 for the grandfather clause.

18 Laws that discriminate on the basis of disability are  
19 subject to rational-basis review and upheld so long as there  
20 is a "rational relationship between the disparity of  
21 treatment and some legitimate governmental purpose." See  
22 Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn, 280 F.3d  
23 98, 109 (2d Cir. 2001). And, as explained above, there is  
24 at least a rational basis to support the prohibition on  
25 aversives.

1 Plaintiffs' contention that the prohibition  
2 distinguishes between students with disabilities who had  
3 IEPs authorizing aversives prior to June 30, 2009, and  
4 students with disabilities who did not have IEPs permitting  
5 aversives, does not save the claim. Classifications that do  
6 not "proceed[] along suspect lines . . . must be upheld  
7 against equal protection challenge if there is any  
8 reasonably conceivable state of facts that could provide a  
9 rational basis for the classification." FCC v. Beach  
10 Comm'ns, Inc., 508 U.S. 307, 313 (1993). Classification on  
11 the basis of authorization to administer aversive  
12 interventions in a student's IEP is, of course, a non-  
13 suspect classification subject to rational basis review.

14 Defendants' decision to grandfather the prohibition of  
15 aversives so that students already authorized to receive  
16 aversives could continue their treatment easily withstands  
17 rational-basis review. Grandfathering bans aversive  
18 interventions without interrupting education programs where  
19 aversives were already being used or already authorized to  
20 be used. It also avoids the tremendous labor of replacing  
21 the IEPs of all students who had IEPs authorizing aversives.

22 Plaintiffs argue that the exception authorizing some  
23 aversive interventions disproves that the ban was motivated  
24 by safety. Not so. Although it is true that an outright  
25 ban would better protect against any harms from aversives,

1 reducing the use of aversives can still provide a benefit by  
2 decreasing the number of students subjected to aversive  
3 interventions and the harms potentially associated with such  
4 interventions.

5 In the end, Plaintiffs' argument is that they disagree  
6 with Defendants' policy choice to ban aversive  
7 interventions. As long as Defendants had a rational reason,  
8 however, the prohibition must be upheld against an equal  
9 protection challenge. Here, the safety of the students  
10 coupled with an attempt to minimize the impact of the  
11 prohibition on students already receiving aversives provided  
12 a rational basis for the prohibition and the use of a  
13 grandfather provision to implement it.

14

15 **V**

16 Plaintiffs contend that the district court erred in  
17 denying their request for a preliminary injunction. Because  
18 the district court correctly dismissed the suit, it did not  
19 err in denying Plaintiffs' request for a preliminary  
20 injunction. See Monserrate v. N.Y. State Senate, 599 F.3d  
21 148, 154 & n.3 (2d Cir. 2010) (holding that a party cannot  
22 satisfy the requirements for a preliminary injunction--  
23 including "likelihood of success on the merits"--if that  
24 party cannot sustain any of its claims for relief).

25

1

**CONCLUSION**

2       Accordingly, the judgment of the district court is  
3       affirmed.

**DISSENT**

RICHARD J. SULLIVAN, District Judge, concurring in part and dissenting in part:

I concur in the majority's opinion with regard to Appellants' Rehabilitation Act, Due Process, and Equal Protection claims, but I respectfully dissent insofar as the Court's opinion relates to the dismissal of Appellants' IDEA claims because I believe that Appellants' complaint alleged sufficient facts to survive a motion to dismiss, and because I find that the materials outside the complaint relied on by the majority do not establish, as a matter of law, the reasonableness of the State's ban on aversive interventions.

In dismissing Appellants' complaint, the district court held that "the allegations demonstrate that the NYSED and the Board of Regents explored the available data, studies, and literature before making a reasoned decision that aversives should be generally prohibited." However, nowhere in the opinion did the district court actually cite from the pleadings to support this conclusion. Instead, the district court merely observed that "plaintiffs do not allege that [d]efendants did not consider the use of aversive interventions before adopting § 200.22" and then concluded

that “[t]he [c]ourt is not willing to second guess that policy decision.” Id. (emphasis added).

While it is of course true that courts are not to second guess state authorities in matters relating to educational policy, the law is equally clear that federal courts may not merely “rubber stamp administrative decisions” of this kind. Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 (2d Cir. 2005). Indeed, this Court has recognized that, notwithstanding “our deferential position with respect to state educational authorities crafting educational policy,” “our review must be searching, and we must recognize that even when educational authorities act with the best intentions they may sometimes fall short of their obligations under the IDEA, and courts must then act to ensure compliance with Congress’s directives.” P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Ed., 546 F.3d 111, 120-21 (2d Cir. 2008) (internal citations omitted). This is particularly the case at the pleading stage, where a plaintiffs’ allegations are presumed to be true. See Fed. R. Civ. P. 12(b)(6); ATSI Commc’ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007). Here, the district court’s conclusion that the prohibition of aversive

interventions was reasonable is particularly problematic, because Appellants alleged in their complaint that the scientific literature, which the district court mentioned (but did not cite) in its opinion, actually "supports the use of aversive interventions and their vital role in providing a FAPE to students with severe behavior disorders."

The majority affirms the district court's dismissal of Appellants' suit, finding that the prohibition of aversive interventions reflects "a considered judgment by the State of New York regarding the education and safety of its children that is consistent with federal education policy and the United States Constitution." In reaching this conclusion, the majority relies not on the pleadings or on the district court's opinion, but rather on four pages from the Education Department's Notice of Emergency Adoption and Proposed Rule Making, of which it has taken judicial notice. While the Court can certainly take judicial notice of facts, these four pages, standing alone, are insufficient to justify the district court's dismissal of Appellants' claims at this early stage of the litigation. Indeed, the first two of those pages simply note the Department's "concerns"

with aversive interventions based on "site visits, reports and complaints filed by parents, school districts and others," Notice of Emergency Adoption & Proposed Rulemaking, N.Y. State Educ. Dep't, June 20, 2006; the latter two merely catalog scientific studies that purportedly support the proposed rule.

Importantly, the scientific studies summarized in the Notice of Emergency Adoption and Proposed Rule Making do not directly call for the prohibition of aversive interventions. To the contrary, these studies presuppose the use and utility of aversive interventions at least in certain contexts and merely set forth "standards" and "strategies to improve an ABI's [aversive behavioral intervention's] effectiveness and acceptability." Id. It is worth noting that of the several studies cited in the Notice of Emergency Adoption and Proposed Rule Making, the two included in full in the record actually describe the need for aversive interventions in certain instances. See Dorothy C. Lerman & Christina M. Vondram, On the Status of Knowledge for Using Punishment: Implications for Behavior Disorders, 35 J. APPL. BEHAV. ANAL., 431, 456 (2002) (noting that "punishment is still sometimes needed to reduce destructive behavior to

acceptable levels"); Sarah-Jeanne Salvy et al., Contingent Electric Shock (SIBIS) and a Conditioned Punisher Eliminate Severe Head Banging in a Preschool Child, 19 BEHAV. INTERVENT. 59, 70 (2004) (noting that ABIs "can sometime be necessary, although not sufficient, to eliminate severe and harmful [self-injurious behavior] in the natural environment"). Consequently, I am unpersuaded that the Notice of Emergency Adoption and Proposed Rule Making cited by the majority provides a sufficient basis for upholding the district court's dismissal.

Of course, like the majority, I am "mindful that the judiciary generally lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." Cerra, 427 F.3d at 192. However, it seems to me that the appropriate course would be to return this action to the district court, which could then review a fuller record, beyond the pleadings, to assess the regulation and its compliance with the IDEA. If my cursory review of the literature in the field is any indication, it seems likely that Appellees will be able to demonstrate that "the regulations represent an informed, rational choice between two opposing schools of thought on

the use of aversives," Alleyne v. N.Y. State Educ. Dept., 691 F. Supp. 2d 322, 333 (N.D.N.Y. 2010), and that Appellants will therefore have difficulty overcoming the "substantial deference" accorded to the review of state policy-making agencies, Wasser v. N.Y. State Office of Voc. & Educ. Servs. for Individuals With Disabilities, 602 F.3d 476, 477 (2d Cir. 2010). Nevertheless, while the outcome may ultimately be the same, it is important that the result be based on a careful assessment of the merits, founded on a well-developed record. In my view, the district court's dismissal - and the majority's affirmance - takes an unnecessary short cut to reach an outcome that cannot be justified at this stage of the proceedings. For these reasons, I respectfully dissent.